BRUNEI REPORTS

Madtassan bin Lamat v Public Prosecutor

COURT OF APPEAL (BRUNEI) — CRIMINAL APPEAL NO 5 OF 1992
TL YANG LP, NAZARETH AND MCMULLIN COMMISSIONERS
3 DECEMBER 1992

Criminal Procedure *— Charge — Conviction to be set aside on grounds of error, omission or irregularity in the charge — Whether there was any evidence of prejudice, failure of justice — Criminal Procedure Code s 371(1) & (2)*

Criminal Procedure *— Judge — Self-disqualification — Judge made adverse finding against appellant in earlier case — Whether there was a failure of justice to render decision unsafe and unsatisfactory*

Criminal Procedure *— Admissions — Admission of accused — Whether oral admissions were voluntary — Whether voire dire should be held*

Criminal Procedure *— Admissions — Admission of accused — Requirements of s 116 of the Criminal Procedure Code not complied with — Whether statements should be excluded — Criminal Procedure Code s 116(1) & (2)*

Statutory Interpretation *— Possession of firearms — Lawful excuse and lawful authority — Whether appellant will have to establish both — Public Order Act (Cap 148) s 28(3)*

The appellant was charged and convicted under s 28 of the Public Order Act (Cap 148) ('the Act') for possession of an M16 firearm and Browning pistol parts. The entire prosecution case against him consisted of numerous oral statements made separately and at different times by the appellant. The appellant, who was sentenced to death, has appealed against the conviction, inter alia, upon the following grounds:

(i) the trial judges erred in law in allowing one of the charges to be amended;
(ii) the Chief Justice had made adverse findings against the appellant in a previous case and should have disqualified himself;
(iii) the trial judges erred in law and in fact in admitting and relying on the alleged oral statements taken in breach of s 116 of the Criminal Procedure Code ('the CPC'); and
(iv) the trial judges erred in the interpretation of s 28(3) of the Act.

Held, allowing the appeal:

(1) Having regard to both the absence of any evidence of prejudice or other failure of justice and the absence of any objection at the trial, the conviction should not be set aside because of any error, omission or irregularity in the charge.

(2) In view of the court's findings in *PP v Metassan* [1993] 1 MLJ 382, the court held in this case that the Chief Justice should have disqualified himself. Therefore, there was a failure of justice sufficient to render the decision unsafe and unsatisfactory.

(3) Without a voire dire, the judges could not have satisfied themselves beyond a reasonable doubt that the oral admissions were voluntary. Therefore, the oral statements were improperly taken into account and the convictions cannot rest upon any of the oral admissions. Therefore, there was no question of there being, independent of the oral statements, sufficient evidence to justify the decision in the court below and the improper admission of the oral statements had occasioned a failure of justice.

(4) Section 116 of the CPC, which required the statements to be reduced into writing, read over and signed by the person being examined orally, was not complied with. Such failure to meet the requirements, although clearly expressed in mandatory terms, would not of itself require the statements to be excluded.

(5) Upon the true construction of s 28(3) of the Act, either lawful authority or lawful excuse was a good defence. Since the appellant had established lawful excuse, he was entitled to be acquitted.

Cases referred to

1 *Lim Gais Khee v R* [1959] MLJ 206 (refd)
2 *Yoh Meng Heng v PP* [1970] 1 MLJ 12 (refd)
3 *R v Bogle* [1974] Crim LR 424 (distd)
4 *PP v Tiew Peng Lam* [1991] 2 CLJ 1197 (distd)

Legislation referred to

Criminal Procedure Code ss 116, 117(2), 371(1), (2)
Public Order Act (Cap 148) ss 2(1), 28(3)

CC Yu (*Yu & Chiew*) for the appellant.
Ivan Leong (Deputy Public Prosecutor) for the respondent.

Cur Adv Vult

Nazareth Commissioner (delivering the judgment of the court): The High Court (Sir Denys Roberts CJ and Mr Commissioner Downey) on 22 August 1992 convicted the appellant on the first, second and fourth of four charges under s 28 of the Public Order Act (Cap 148) ('the Act') and sentenced him to the mandatory sentence of death.

The charges were as follows:

Charge 1

That the appellant on or about 15 December 1990, at the Bolkiah Camp Armoury, Brunei Darussalam, in a special area without lawful excuse had under his control components of a Browning firearm without lawful authority [19 parts were specified].

Charge 2
That the appellant on or about 15 December 1990, at house no 5 Simpang 74–30, Gadong, in a special area, without lawful excuse had in his possession components of an M16 firearm without lawful authority [18 parts were specified].

Charge 3
That the appellant on a date unknown before 15 December 1990 in Brunei Darussalam, did abet one Ak Metassan bin Pg Metussin in a special area without lawful excuse to possess a Browning firearm without lawful authority therefor to wit: 'you delivered to him one Browning firearm containing the serial no 77C59497'.

Charge 4
That the appellant on a date unknown before 15 December 1990, in Brunei Darussalam, in a special area without lawful excuse did have in his possession a Browning firearm without lawful authority, to wit: 'a Browning pistol with the serial no 77C59497 on the frame'.

The factual background necessary to address the grounds of appeal can be stated quite shortly. The appellant was a weapons mechanic at the armoury in the Bolkiah Workshop of the Royal Brunei Armed Force ('RBAF'). It was one of the appellant's main jobs to repair firearms belonging to all units, including M16 firearms and Browning pistols. Spare parts for this purpose were kept at the workshop, and he had access to them. The prosecution's allegation is that the firearms mentioned in the charges were made up from such parts which, along with others, were unlawfully removed from the workshop or taken into control or possession by the appellant. The police action that will be referred to was prompted by information they received of the unauthorized possession of firearms, components and ammunition by certain members of the RBAF and other persons connected with them.

On 15 December 1990 about 9.15am, the police went to the Bolkiah Workshop to look for the appellant who happened to be on leave. So at about 11.30am, they went on to his father's house at Gadong where they arrested him. Subsequently, that same day, they returned with him to the house and from a cupboard in his room, he produced the 18 parts listed in charge 2 and laid them on he floor.

The police later that day took the appellant to the Bolkiah Workshop where he led them to a work-table and produced from the drawer and placed on top of the table several parts of a Browning pistol. Then, with the key of the adjoining firearms store, or strong room as it was also referred to, which was obtained from the sergeant on duty, it was entered and the appellant opened a cupboard in it with another key kept in a key press alongside. There were several large components of pistols in it. The appellant took out a slide, frame and magazine. The parts obtained from the work-table drawer, and the cupboard in the strong room formed the subject of charge 1.

As to charge 3, since it was held that there was no case to answer on this charge, it need only be said that it related to a Browning pistol (serial no

77C9497) which the prosecution alleged was given by the appellant to Ak Metassan (a co-accused with the appellant in CT 7/91) but ultimately returned to him and disassembled by him into the parts that were recovered from the drawer in the workshop and the cupboard in the strong room.

The prosecution alleged that the appellant had in his possession the Browning pistol he received from Ak Metassan and disassembled into the Browning pistol parts produced by him. This formed the basis of charge 4.

The appellant made two written statements. The first taken under s 116 of the Criminal Procedure Code ('the CPC') was a very full statement, but was held inadmissible as not having been shown to be voluntary, ie free from oppression beyond reasonable doubt. The second written statement, ie a warned statement under s 117(3), was admitted as voluntary, but was regarded by the court as neutral as it simply stated that the appellant did not wish to add anything.

In addition, the appellant made numerous oral statements mostly separately and at different times to DSP Ismail, ASP Wahab, ASP Azahari and SM Bagol, many of a composite nature comprising the admission of several facts. They covered almost the entire prosecution case alleged against him. Contrary to s 116 of the CPC, only a couple or so were recorded in writing and none was read over to the appellant and signed by him.

There was little other evidence of the charges.

Grounds of appeal

The appellant now appeals against conviction upon grounds which, as pursued by Mr CC Yu, who appeared from him, were as follows:

(A) Amendments to charge 4, ie that the learned trial judges erred in law in allowing the amendments to this charge.

(B) Objections to composition of the court, ie that the learned Chief Justice had made adverse findings against the appellant in a previous case and should have disqualified himself.

(C) Oral statements, ie that the learned trial judges erred in law and in fact in admitting and relying upon alleged oral statements taken in breach of s 116 of the CPC.

(D) Control, ie that the learned trial judges erred in law and in fact when they held that the appellant had under his control components of the Browning firearm *without lawful authority and lawful excuse* when they were in the strong room cupboard and in the armoury work-table drawer and especially when the appellant was on leave.

(E) 'Firearm', ie that the trial judges erred in law in interpreting the definition of 'firearm' in s 2(1) of the Act in a manner that embraced the M16 firearm.

(F) Lawful excuse, ie that the learned trial judges erred in the interpretation of s 28(3) of the Act.

(G) General

(i) that the learned trial judges erred in law and in fact in totally disbelieving and therefore rejecting the evidence of the appellant without giving due consideration or weight thereto;

(ii) that the learned trial judges' conclusion as to the finding of facts and thereby convicting the appellant is against the weight of the evidence;
(iii) that the learned trial judges erred in law in saying that the burden was on the appellant to prove lawful authority; and
(iv) that the learned trial judges erred in law in admitting the statement as voluntary after the statutory warning was given.

Ground (A) — amendments to charge 4

Turning then to the grounds of appeal, in pursuing ground (A), Mr Yu pointed to the absence of any indication as to when the offence in charge 4 is alleged to have taken place other than 'on a date unknown before 15 December 1990'; and also to the absence of any indication as to where in the whole of Brunei it is alleged to have been committed. Mr Ivan Leong for the respondent touched upon the difficulties that confronted the prosecution in being more precise about the date, but not the location of the offence, although there can be seen to be some difficulty about that also. Nonetheless, we dare say that it should have been possible for the charge to have been made somewhat more specific in both respects. We do not propose to go further into that matter in view of what follows.

Mr Yu relied upon *Lim Gais Khee v R*[1] and *Yoh Meng Heng v PP*[2] for the proposition that the defence should have had such particulars as may in the circumstances have been necessary to enable it to know the case it had to meet, a well-established proposition which was not disputed. However, he did not indicate in what way the defence was in fact prejudiced. Section 371 of the CPC provides that:

> (1) ... no finding, section or order passed or made by a court or competent jurisdiction shall be reversed or altered on account of —
>
> (a) any error, omission or irregularity in the complaint, summons, warrant, charge, judgment or other proceedings before or during trial ...
>
> unless such error, omission, ... irregularity, want ... has occasioned a failure of justice.
>
> (2) In determining whether any error, omission or irregularity in any proceedings under this code has occasioned a failure of justice, the Court shall have regard to the fact whether the obligation [objection] could and should have been raised at an earlier stage in the proceedings.

Having regard to both the absence of any evidence of prejudice or other failure of justice and the absence of any objection at the trial, we are satisfied that ground (A) must fail in the light of the provisions of s 371(1) and (2) of the CPC.

Ground (B) — composition of the court

Proceeding to ground (B), ie the objection to the composition of the court, the background is of special significance. Criminal Trial No 7 of 1991 in which the appellant was the fourth defendant was held at various times between 10 February 1992 and 20 April 1992, the judges being Sir Denys Roberts CJ, and Mr Commissioner KK Pang. Charge 10 charged the appellant under s 28 of the Act with abetting the possession of a firearm

A without lawful authority and lawful excuse, in that one night in the month of May 1990, at the RBAF Penanjong Garrison Barracks in a special area he gave a Browning pistol with the identification serial number filed off to Ak Metassan, the third defendant in that case, who gave it to Duraman bin Burut. And on the other charge, Charge 11, he was charged with possession of a firearm without lawful authority and lawful excuse, in that one night in the month of May 1990 at the Penanjong Garrison Barracks he had in his possession the same firearm. In support of those charges, the prosecution proved two written statements; the first, a very full s 116 of the CPC statement made on 17 December, and the second made after a s 117(3) of the CPC warning on 25 December. The appellant had objected to those statements claiming that they were made up, and that he was threatened and frightened by the police. After a voire dire in which the judges accepted the evidence of the police officers concerned and rejected that of the appellant, both statements were admitted in their entirety. The appellant was convicted on both the charges in the earlier trial. The prosecution having indicated their intention of relying upon those statements in C/T No 9 of 1991, ie the trial that is the subject of this appeal, it was not surprising that on the second day of the trial, Mr Yu submitted that the presiding judge (Sir Denys Roberts CJ) should disqualify himself. The court refused the application, recording its ruling in the following words:

> Before the first witness was called, counsel for the defendant suggested that it was undesirable for the court to be constituted as it was.
>
> This was on the basis that it would be difficult for the presiding judge to maintain an open mind, since he had already ruled, in another trial, that statements given by the defendant to the police were voluntary, and that the defendant had been disbelieved in the other trial when it was submitted that his statements were the result of threats and oppression and were signed by him because he was frightened and that they did not represent what he said.
>
> It was argued that there was a risk that the presiding judge would not approach the admission of a statement in this case with an open mind. He was therefore invited to decide that another judge should preside.
>
> We did not know that evidence was to be put forward by the defendant to show that his statement was not voluntary. We were told by counsel that there would be such a challenge, though not if this was to be based on the same evidence as was given in relation to the statement in CT 7/92, or on other grounds. In that trial, this defendant gave no evidence on the voire dire.
>
> We do not, however, accept the argument that, because the presiding judge arrived at the conclusion, in another trial, that a statement was voluntary, he must necessarily reach the same conclusion in this trial or that he is likely to prejudge the issues of fact because of his earlier experience. We have no reason to suppose that he will not retain an open mind in his approach to the guilt or innocence of the defendant in this trial.
>
> In small jurisdictions, judges and magistrates often have to try persons about whom they have knowledge from previous trials. This is not considered a sufficient reason for removing them from the later trial or for assuming that this knowledge will mean that they are not able to approach the later trial with an open and unbiased mind. Nor is there any rule of law that on retrial, where the judge must necessarily know the majority of the facts, should take place before a different judge. This is a matter for the court's discretion — see *R v Bogle* [1974] Crim LR 424 (CA) and *PP v Tiew Peng Lam* [1991] 2 CLJ 1197.

Mr Yu makes the following submissions. He emphasized that the very firearm that is involved in this case was the subject of the charges against the appellant in the earlier case. Also, that it is the same written statement of 17 December that is involved. The appellant was disbelieved by the court in the earlier trial and the police officers were believed. Finally, oral statements were admitted in the earlier cases and it was intended that other oral statements would be produced in this case, some made to the same police officers. The oral statements were in fact admitted, although the written statement of 17 December 1990 was held inadmissible.

Mr Yu's complaint was not that the judges were biased, but that justice was not seen to be done. In that context, the peculiar features referred to by Mr Yu must be regarded as exceptional. We do not think that they wholly fall within the analogy of a re-trial, with which the *Bogle*[3] and *Tiew Peng Lam*[4] cases were concerned. In particular, in a re-trial the issue is re-tried, whereas in this case the findings of the presiding judge in the earlier case remain in force on record, and it is those findings that would be seen as prejudicing the appellant by seemingly predetermining crucial issues that had to be addressed in this case. We think those were powerful reasons that would rarely be encountered, and therefore less likely to present major demands for other or additional judges. We observe also that it was submitted that it would not have been unduly difficult by administrative action to make arrangements for the case to be heard by a differently constituted court.

A similar ground of appeal pursued in very similar circumstances was the primary reason this court allowed a related appeal, ie Criminal Appeal No 4 of 1992. In the judgment, delivered earlier today, the authorities and relevant considerations were closely examined. [See [1993] 1 MLJ 382.] Given the view we have taken of other grounds of appeal in this case, we do not find it necessary to do the same here. Suffice it to say that for the reasons already indicated and considerations similar to those detailed in that judgment, we do not think we could properly come to a different conclusion.

Ground (C) — improper admission of oral statements

Ground (C) complains that the oral statements were admitted without a voire dire despite objection. It is clear that there were first oral objections to the admissions made by the appellant; his counsel then at the invitation of the court put in written grounds of objection to 'all his statements whether oral, under ss 116 or 117 of the CPC obtained or taken by the police'. It is also clear that oral admissions were admitted in evidence without a voire dire. Counsel for the appellant does not appear to have objected to evidence of the oral statements as the individual police officers were giving evidence; certainly he did not claim to have done so, nor do the notes of evidence record any such object. It was, in any case, not submitted to us on behalf of the respondent that no voire dire was therefore called for in respect of the oral statements, nor are we disposed to take that view, having regard to the unequivocal objection to all statements following the earlier oral objection. Section 117(2) provides that:

> The Court shall admit under subsection (1) a statement made by an accused, only if the prosecution satisfies the court that the statement was voluntary, that is to say that it was not obtained by violence, inducement, threat or oppression by a person in authority.

Without a voire dire we cannot see how, in the particular circumstances, the judges could have satisfied themselves beyond reasonable doubt that the oral admissions were voluntary.

It follows therefore, in our view, that a voire dire should have been held, that the oral statements were improperly taken into account, and that the convictions cannot rest upon any of the oral admissions, none of which were addressed in the voire dire held, which was concerned only with the two written statements and resulted in the rejection of the first.

Mr Yu also sought to rest his submission upon the failure of the police to comply with the requirements of s 116(1) and (3) of the CPC, requiring such statements to be reduced into writing, read over and signed by the person being examined orally. Such failure to meet its requirements, although clearly expressed in mandatory terms, would not of itself require the statements to be excluded; but it reinforces our conclusion that the oral statements in respect of which they were in breach cannot be relied upon.

We turn then to address the consequences of the exclusion of the appellants' oral statements. Without them the evidence is largely that he led the police to or produced the M16 and Browning pistol parts, and that he admitted in his evidence that the Browning pistol parts he took out of the drawer would make up a complete weapon, less the return spring guide and the three larger parts found in the strong room. The judgment (at pp 43 and 44) deals with this in the following way:

> What is the defence put forward to this charge? D admits that he took from the drawer in photo 49 parts of a Browning pistol which would make up a complete weapon, less the return spring guide and the three larger parts which were found in the strong room.
>
> But, he says, the police asked him to take out of the drawer such parts as would make up a Browning pistol and that, although he knew what was in the drawer, this was used by all the armourers in the workshop and was the only drawer available in the workshop.
>
> Mr Scholefield's evidence was that the parts in photos 49 and 50 should be on the racks if they are serviceable.
>
> He said that he would be suspicious if he found that the right parts for building up a weapon were found in the drawer and the cupboard.
>
> In his view, one of the ways of concealing spare parts is to put them in the drawer. The parts would be far less suspicious than a complete pistol.
>
> It is possible to believe the defence? Were as the items placed in the drawer by other armourers, who had access to the drawer, or by the defendant who had received a complete Browning pistol, less one part?
>
> D says that he knew what was in the drawer but had put no parts there, since he was not working on the Browning, but that all armourers had access to it.
>
> Yet he was able to take from the drawer or the cupboard all the parts, with one exception, which made up a Browning. The irresistible inference is that he was able to do so because he had put the parts there himself and was in control of them to the moment of his arrest on 15 December 1990. We did not believe his evidence that he made up a weapon because the police told him to do so.

Mr Leong for the respondent adopted that approach although, in the course of his other submissions, he conceded that the prosecution case could not survive the exclusion of all the oral statements. Without disputing the underlying premises or primary facts relied upon in the foregoing passage quoted from the judgment (at pp 43 and 44), we are unable to accept the inference sought to be drawn, as irresistible.

Proceeding to the individual charges, it is plain from the summary of evidence and conclusions in the judgment (at pp 37–50) in relation to each charge that there is heavy and indispensable reliance upon the oral admissions made to the police officers in respect of each of those charges. Indeed the essential findings of fact appear substantially if not almost wholly to the founded upon those admissions.

We are satisfied that there is no question of there being, independently of the oral statements, sufficient evidence to justify the decisions below; nor does it appear to us that if the oral statements had not been received, that ought not to have varied the decision, in terms of s 167 of the Evidence Act. Furthermore it is also clear that the improper admission of the oral statements has occasioned a failure of justice; and that there is no question or suggestion that the objection to admission of those statements could and should have been raised at an earlier state in the proceedings, in terms of s 371 of CPC. For these reasons, neither of those sections, which in Brunei are the equivalent of 'the proviso', can operate to save the convictions.

Plainly, therefore the convictions in respect of all three charges cannot stand and must be set aside.

Ground (D) — control

On ground (D), Mr Yu relied upon the fact that the work-table in the drawer of which the Browning pistol parts were found, was used by a number of other armourers, all of whom had access to it. Also that the firearm store or strong room was kept locked and the keys either held at a post half a mile away or, during office hours, in the custody of the sergeant on duty at the armoury. Furthermore, he submitted that the appellant could not have had possession or control of those parts after 15 December 1990, when he was arrested, nor for sometime before, while he was on leave. We do not find it necessary to address these submissions as it is clear from the judgment and not disputed by Mr Leong that control can only be established on the basis of the oral admissions which we have held cannot be relied upon.

Ground (E) — definition of 'Firearm'

'Firearm' is defined in s 2(1) of the Act in the following way:

> 'Firearm' means any lethal barrelled weapon of any description from which any shot, bullet or other missile can be discharged or which can be adapted for the discharge of any such shot, bullet or other missile and any weapon of whatever description designed or adapted for the discharge of any noxious liquid, gas or other thing, and includes any component part of any such weapon as aforesaid;

Mr Yu submitted that to be accepted as components within the definition of 'firearm' in the Act, the parts discovered in the work-table drawer in the

workshop and in the strong room cupboard, would have to be capable of discharging a missile. Even if that restricted construction of the definition were accepted, it would plainly embrace the Browning pistol parts found in the armoury workshop and firearm store, for the evidence is that they constituted an entire pistol save only the return guide spring, which did not prevent single shots being fired, albeit with the manual reloading of one round at a time.

The position is rather more complicated in relation to the M16 firearm parts, for these were said to comprise only about 10% of a firearm. Having regard to our conclusions on the other grounds, we do not find it necessary to deal with this ground. We think an authoritative construction of the definition of 'firearm' should be reserved until the court is able to deal with the matter upon submissions that are rather more comprehensive than those we received.

Ground (F) — lawful excuse

This ground is founded upon the contention that on the true construction of s 28(3) of the Act, the appellant did not have to established both lawful authority and lawful excuse. A contrary view was acted upon by the judges as is apparent from the following passage in their judgment (at p 35):

> In the present case we are agreed that D, upon the facts did not have lawful authority for his possession of the M16 parts. We are also agreed upon the facts that he had a lawful excuse for such unauthorized possession. One of us, however, thinks that it is only necessary for the defendant to establish *either* of the two qualifications of 'defences' in order to secure an acquittal, because the two expressions raise distinct issues. (Cf *Wong Pooh Yin v PP*, supra at pp 101 and 106. However in view of the clear views to the contrary expressed in the earlier trial (CT 7/91) he is not disposed to press his view to disagreement.

We rejected such as construction in our judgment in Criminal Appeal No 2 of 1992 (at p 20) and held that upon the true construction of s 28(3), either lawful authority or lawful excuse was a good defence. The erroneous construction adopted by the court below led to rejection of the appellant's defence of lawful excuse upon that point of law without its factual merits being considered, as is apparent from the judgment (at p 48). It follows therefore that upon this ground also the conviction under charge 2 cannot stand.

Ground (G) — general

We turn finally to ground (G). Although para (i) and (ii) were not abandoned, this ground was pursued only in relation to para (iii) and (iv).

Paragraph (iii) is founded upon the contention that as a matter of law, the onus of proving the lack of lawful authority rests on the prosecution. We rejected such a contention in Criminal Appeal No 2 of 1992 for the reasons there given (at pp 17– 20). But we also held that a defendant did not have to establish lawful authority *and* lawful excuse, so that if the appellant established lawful excuse, there would be no onus upon him to establish also lawful authority.

In the passage quoted from their judgment (at p 35) the judges held that that appellant 'had a lawful excuse' for his unauthorized possession of the M16 firearm. But they nonetheless (upon the view of the law they took, which we rejected in Criminal Appeal No 2 of 1992), regarded it as necessary for the appellant to prove lawful authority and in addressing that matter placed the onus upon him.

Since the appellant had established lawful excuse he was entitled to be acquitted, and on this ground also the conviction on charge 2 must be set aside.

Paragraph (iv) complains that the second written statement should not have been admitted because the impression caused by the oppression alleged by the appellant, could not have been removed because s 116(6) makes provision for such removal only in relation to inducement, threat or promise and not to oppression. We rejected such a submission from Mr Yu in our judgment (at p 32) in Criminal Appeal No 2 of 1992, for the reasons there given and need say no more.

For the reasons given the appeal is allowed, the convictions on the three charges are quashed and the sentence set aside.

Appeal allowed.

Reported by Jeanne Tan